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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 416

UNITED STATES OF AMERICA, PETITIONER

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court (O. R. 40–45; R. 16–23)[1] are reported in 49 F. (2d) 395 and 14 F. Supp. 868. The opinions of the Circuit Court of Appeals (R. 4–9; 65–68; 75–78) are reported in 60 F. (2d) 745, 95 F. (2d) 867, and 98 F. (2d) 132.

[1] This case was twice tried and twice appealed. There are two separate records. The record on the first appeal, designated in this Court as Volume I, was received in evidence on the second trial and marked petitioner's Exhibit 1 (R. 24). All references to that original record will be designated "O. R."; otherwise all record references herein will be to the second record, now designated as Volume II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1938 (R. 78). The petition for a writ of certiorari was filed October 13, 1938, and granted November 21, 1938. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court has jurisdiction of a suit against the United States for the year 1917 seeking the recovery of internal-revenue taxes in excess of $10,000 where the amount sought to be recovered constitutes a portion of the amount allowed by the Commissioner on a special assessment claim for 1917 which was credited against a barred deficiency for 1918 and where the claim for refund upon which jurisdiction is asserted was filed more than four years after the payment of the 1917 tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved will be found in the Appendix, *infra*, pp. 29–36.

STATEMENT

The following facts material to the question of jurisdiction are alleged in the petition, filed September 19, 1929 (O. R. 1–3, 7–8):

Respondent is a Massachusetts corporation. The Collectors of Internal Revenue in office at all

times mentioned in the petition were not in office at the date of the filing of the petition (O. R. 1).

Paragraph Sixth of the petition (O. R. 2) alleged:

> Petitioner [respondent here] duly filed with the Collector of Internal Revenue for the District of Massachusetts the income and profits tax returns for the calendar years 1917 and 1918 and the relevant dates of filing of all returns; the dates and amounts of all payments; the dates of the claims for refund; and the dates of the rejection or denials of the said claims for refund are herein detailed as follows:
>
> The final 1917 return was filed on or before June 1, 1918. The final [1918] return was filed on or before June 15, 1919. There was paid on account of the 1917 original return—list page 1395—line 17—$277,586.23, and, in addition, August 1920, list page 31—line 1—$6,510.54—total, $284,096.77. There was paid for 1918 list, per original return, account No. 403,152, including interest of $345.15, the sum of $242,384.72 and there was also paid August 1920 list, additional, page 32—line 2—$163.25, making a total of $242,-547.97, from which, when the interest for delay in filing and paying in 1919 was subtracted, there was left a tax paid of $242,-202.82. Final communication was received January 23, 1926, showing overassessment for 1917 without interest of $91,570.34 and a further additional proposed assessment for

1918 of $34,555.68; to these two proposals the taxpayer entered no objection and in due course, subject to inability to pay on the part of the Treasury Department through lack of cash, the overassessment for 1917 less the additional tax for 1918 plus interest was received in the fall of 1927 undated by the collector, as per his overassessment certificate.

The taxpayer filed, and possesses acknowledged receipt of said action, refund claims for 1917 and 1918 in the amount of $34,555.68 with request for interest on November 28, 1927. These claims were rejected by letters received both in January and February 1928.

The petition alleged as the ground of suit that the Commissioner of Internal Revenue when preparing his refund or overassessment of $91,570.34 for 1917 credited it against the $34,555.68 for 1918, and returned to the taxpayer only the net difference plus interest, without ever having assessed the additional tax for 1918 (O. R. 2). The petition prayed a refund of $34,555.68 "as refund now for 1918 illegally paid, or requesting the said same amount for 1917 as never having been fully paid after allowance" (O. R. 3).

The answer (O. R. 3–4, 8–9) admitted all of the allegations of the petition except the allegation or suggestion or implication that the additional tax of $34,555.68 for 1918 was not assessed or was assessed at any other time than in July 1926.

Elsewhere in the records will be found the following facts:

Respondent paid its taxes for 1917 in or prior to October, 1920 (O. R. 13). It requested a special assessment of its taxes for 1917 and 1918 (O. R. 32–33, 37; R. 44, 52, 57–58). The request was granted, and the Commissioner determined an overassessment for 1917 of $91,570.34 and a deficiency for 1918 of $34,555.68 (O. R. 32–33). The Commissioner notified respondent (O. R. 30–31, 35; R. 56–59), assessed the 1918 deficiency on July 3, 1926 (O. R. 25), and issued a certificate of overassessment for 1917 in July 1926 (O. R. 23).

On July 27, 1926, the Commissioner sent the schedule of overassessments to the collector for action. The collector signed and returned the schedule to the Commissioner, certifying the application of $34,555.68 as a credit against 1918 taxes, and further certifying that $52,304.02 was the net amount refundable for 1917. On October 11, 1926, the Commissioner signed the schedule of refunds and credits (O. R. 51).

On some undisclosed date prior to September 16, 1925, respondent filed claims for refund for 1917. On November 28, 1927, respondent filed another claim for refund for 1917 and a claim for refund for 1918, each in the amount of $34,555.68, referred to in the petition (O. R. 2). The 1917 claim was not offered in evidence, and is not in the record. A copy of the 1918 claim was offered in evidence by

the Government, but apparently was not received (R. 30). A copy of it, however, is in the record (R. 38). The brief which is referred to in the 1918 claim (R. 39–49), discloses that the claims filed on November 28, 1927, are grounded on the contention that the additional tax for 1918 had never actually been assessed and that assessment could not then be made "as the Waiver expired December 31, 1926" (R. 46, 48).

Both claims were rejected in January and February 1928 (O. R. 2). The action was commenced on September 19, 1929 (O. R. 1).

On the first trial, respondent received a judgment in the sum of $44.07 (O. R. 2; 49 F. (2d) 395). Respondent appealed to the Circuit Court of Appeals for the First Circuit, which vacated the judgment and remanded the case to the District Court for further proceeding (R. 4–9; 60 F. (2d) 745). On the second trial, the District Court entered judgment for respondent for $34,555.68, plus interest (R. 15; 14 F. Supp. 868). The judgment was affirmed upon an appeal by the Government (R. 68; 95 F. (2d) 867). Upon rehearing, the judgment was reaffirmed (R. 78; 98 F. (2d) 132). A petition for a writ of certiorari was filed on October 13, 1938, and was granted on November 21, 1938 (R. 81).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the District Court had jurisdiction to entertain this suit.

2. The court below erred in not directing dismissal of the cause for lack of jurisdiction.

SUMMARY OF ARGUMENT

This suit was instituted in the District Court to recover from the United States a sum in excess of $10,000 representing the amount of an overpayment determined by the Commissioner of Internal Revenue for the year 1917 which was credited by the Commissioner against a deficiency for the year 1918 allegedly assessed after the expiration of the statute of limitations. The petition filed in the District Court attempted to state a cause of action for 1917 on the theory of an illegally withheld allowed overpayment, or, alternatively, for 1918 on the theory of an illegally collected tax.

The District Court was clearly without jurisdiction as to 1918, because the taxes for that year were not collected by a collector of internal revenue but were satisfied by the credit made by the Commissioner. The respondent apparently concedes lack of jurisdiction as to 1918.

The District Court was without jurisdiction as to the year 1917, because, (1) it was not alleged and proved that a claim for refund was filed within four years of the payment of the tax for that year, and that suit was brought within two years of the rejection of such claim; (2) it was not alleged and proved that the collector wrongfully collected taxes for 1917; (3) the cause was grounded solely upon

an allowed overpayment; (4) the credit of the allowed overpayment for 1917 against taxes assessed for 1918 precludes suit for the year 1917.

The judgment of the court below should be reversed, with directions to dismiss the case for lack of jurisdiction.

ARGUMENT

The Commissioner of Internal Revenue applied an amount, in excess of $10,000, which was an overpayment of respondent's taxes for the calendar year 1917, against a deficiency in its taxes for the calendar year 1918. The court below has held that the deficiency for 1918 was not assessed within the statutory period as extended by waiver.[2]

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[2] The Government contended in the courts below that the time for assessment of the 1918 deficiency had been extended by waivers beyond the date when the assessment was made. The District Court so held upon the first trial (O. R. 41–43). That decision was reversed by the Circuit Court of Appeals because of the exclusion of certain evidence (R. 4–8). Upon the second trial five waivers were introduced. Under these waivers the assessment of 1918 taxes was timely if (1) the first four waivers had been tacked, or (2) if the fifth waiver was valid although not signed by the Commissioner, or (3) if the word "waiver" on the assessment list signed by the Commissioner were held to refer to the fifth waiver, or (4) if sufficient consent in writing by the Commissioner were found in the fact that the Commissioner had by letter requested the execution of the fifth waiver. Decision went against the Government on all of the points. The court below affirmed, holding, *inter alia*, that certain of the questions raised by the Government had not been properly preserved for appellate review (R. 66–68). The petition for certiorari, however, asked for a review by this Court only of the question of the jurisdiction of the District Court.

Respondent's petition in the District Court (O. R. 1–3) sought recovery, alternatively, of 1917 taxes as being erroneously and illegally withheld after allowance, or of 1918 taxes as having been erroneously and illegally collected (O. R. 1, 3). We believe that the court was without jurisdiction to entertain the suit to recover taxes for either year.

I

THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THIS CASE AS A SUIT TO RECOVER TAXES FOR THE YEAR 1918

There can be no doubt that the District Court had no jurisdiction to entertain this suit as one to recover taxes for the year 1918, the year to which the overpayment was applied. In *Lowe Bros. Co.* v. *United States*, 304 U. S. 302, a suit had been brought which was construed as a suit to recover an overpayment of taxes in excess of $10,000 for the year to which the deficiency had been applied (1917, in that case). This Court pointed out that suits under Section 24 (20) of the Judicial Code, *infra*, p. 29, against the United States for sums in excess of $10,000 were in substitution of suits which might have been had against the collector had he still been in office. Therefore, since for the year to which the overpayment had been applied there had been no collection by the collector of the excessive taxes, nor any other act which would subject the collector to personal liability, the suit could not be maintained

against the United States. 304 U. S. at 306. The court below apparently agreed (R. 78) that with respect to 1918 the *Lowe Bros.* case was controlling, and respondent made no argument to the contrary in its brief in opposition to the petition for certiorari.

II

THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE CASE AS A SUIT TO RECOVER TAXES FOR THE YEAR 1917

On the second appeal, the court below held that the District Court had jurisdiction of this case because Section 3226 of the Revised Statutes, *infra*, p. 34, did not apply since "in the last analysis [the action] is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax" (R. 66). The Government moved for a rehearing, contending that inasmuch as the amount in suit was more than $10,000, the District Court under Section 24 (20) of the Judicial Code did not have jurisdiction, whether the suit be deemed to be grounded on the Commissioner's certificate of overassessment as an account stated, or, as seems to have been the theory of both the original petition and the decision of the court, on a balance due on an allowed claim.

The rehearing was granted, and a further opinion handed down (R. 75–78). In that opinion the court held that the suit "was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly

applying it to an invalid assessment of a deficiency tax for 1918" (R. 78). By treating the consideration by the Commissioner of the 1927 claim for refund filed on November 26, 1927, as a reopening of an original claim for 1917, which original claim the court states was timely filed, the court reached the conclusion that the provisions of Section 3226 had been met, suit having been brought within two years of the rejection of the claim for 1917, filed in November 1927.

We submit that there are at least three separate respects in which the petition fails to sustain the theory upon which jurisdiction was founded by the court below. The petition is deficient in that (1) it does not allege the filing of a claim for refund within four years of the payment of the tax for 1917, and the bringing of suit within two years of the rejection thereof, or within five years of the payment of the tax; (2) it does not allege that the tax for 1917 was erroneously or illegally collected; and (3) it attempts to state a cause of action on an allowed claim for 1917. We shall discuss these below. Finally, we submit that in addition to these deficiencies, there is a more fundamental objection to the petition based upon the fact that an overpayment for 1917 had been determined by the Commissioner of Internal Revenue, and had been applied in satisfaction of taxes assessed against the taxpayer for other years. Under those circumstances, as we discuss in more detail in our brief in *United*

States v. *Jaffray*, No. 437, to be argued herewith, the proper year for suit is the year to which the overpayment was applied, and the forum, if the claim exceeds $10,000, is the Court of Claims.

A. The Petition Does Not Allege the Filing of a Claim for Refund Within Four Years of the Payment of the Tax for 1917, and the Bringing of the Suit Within Two Years of the Rejection Thereof, or Within Five Years of the Payment of the Tax

Section 3226 of the Revised Statutes, reenacted in Section 1113 (a) of the Revenue Act of 1926, *infra*, p. 34, provides that no suit shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been filed with the Commissioner of Internal Revenue, and that no such suit shall be begun after the expiration of five years from the date of the payment of the tax unless the suit is begun within two years after the disallowance of the part of the claim to which the suit relates. Section 284 (b) of the Revenue Act of 1926, *infra*, p. 33, provides that no refund shall be made after four years from the time the tax was paid in the case of a tax imposed by the Revenue Act of 1917 unless before the expiration of such period a claim therefor is filed by the taxpayer.

It is well settled that compliance with these provisions is a jurisdictional prerequisite to the maintenance of suit both as against the United States and as against collectors of internal revenue. *United States* v. *Michel*, 282 U. S. 656; *Rock Island*

&c. R. R. v. *United States*, 254 U. S. 141, 142–143; *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Chicago Golf Club*, 84 F. (2d) 914 (C. C. A. 7th); *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d) 626 (C. C. A. 8th), certiorari denied, 273 U. S. 763; *John F. Jelke Co.* v. *Smietanka*, 86 F. (2d) 470 (C. C. A. 7th), certiorari denied, 300 U. S. 669. See also *Rand* v. *United States*, 249 U. S. 503, 510; *Finn* v. *United States*, 123 U. S. 227.

While the petition, filed in the District Court on September 19, 1929 (O. R. 1–3), alleges the legal conclusion that all claims for refund and other action requisite to the suit had been duly made, this general allegation is followed by a particular averment that the dates and amounts of all payments, the dates of the claims for refund and the dates of the rejections or denials of the claims for refund are "herein detailed as follows". Cf. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 277. The averment which followed as to the payment of the tax for 1917 is not specific as to dates, but the inference is that $277,586.23 of the tax was paid prior to the August 1920 list and that an additional $6,510.54 was paid pursuant to the August 1920 list.[1] The averment as to the filing of claims for refund which followed stated that the taxpayer filed refund claim for 1917 in the amount of $34,555.68 on November 28, 1927. Since all of the tax for 1917 was paid on

[1] At the first trial it was agreed that $277,586.23 of the 1917 taxes was paid in installments in 1918 and 1919, and that the additional $6,510.54 was paid on October 14, 1920 (O. R. 13).

or prior to October 14, 1920, and since the only claim for refund alleged to have been filed was that of November 28, 1927, it is readily apparent that the petition itself fails to allege a fulfillment of the condition precedent to suit that a claim for refund be filed within four years after the payment of the tax.

On the rehearing in the court below, the respondent went beyond the petition, and urged that the certificate of overassessment issued by the Commissioner (O. R. 23) conclusively shows that it filed a timely claim for refund of taxes for the year 1917. Even if the allegations of the petition may be thus supplemented, we find nothing in the certificate of overassessment stating that any claims for refund had been filed. The reference in that instrument to claims for refund was that there had been a "consideration of all the claims (*if any*) filed by" the respondent. [Italics supplied.] However, in statements sent to the respondent on September 16, 1925 (O. R. 30–33), and January 23, 1926 (O. R. 36–37), it does appear that the respondent had filed three claims for refund for 1917 taxes prior to the November 28, 1927, claim, but the dates of the filing of these claims are not shown and the claims themselves were not introduced in evidence. Not only, therefore, does the petition fail to allege the filing of a claim for refund within four years of the payment of the tax for 1917, but the record as it stands totally fails to provide proof which would support such an allegation if it had been made.

Furthermore, even if it should be assumed that the claims for refund referred to in the statement of September 16, 1925 (O. R. 32), were timely filed, the same statement shows that the claims were being allowed to the extent of $91,570.34 based upon the respondent's application for special assessment under the provisions of Section 210 of the Revenue Act of 1917, *infra,* p. 29, and that the claims would be rejected for $30,144.75. It is the credit on October 11, 1926, of $34,555.68 of the allowed amount against a deficiency for 1918 assessed July 3, 1926, that the respondent complains of in this case, and it was this credit which the court below held constituted a denial of the respondent's claim for 1917 for that amount. If it be assumed that the credit of $34,555.68 of the 1917 allowed overpayment against the 1918 deficiency constituted in effect a denial of the respondent's claim for 1917 to that extent, then it is apparent that the present suit instituted on September 1[illegible], 1929, was not brought within the two years after disallowance, as required by Section 3226 of the Revised Statutes, unless something additional be shown to have tolled the time for bringing suit.

The respondent contended below that the time for bringing suit had been tolled by the filing of the November 28, 1927, claim for 1917, which, the respondent urged, had the effect of a request for a reconsideration of the "denial" of the earlier claim. The court below, assuming that there had been a

timely-filed earlier claim, sustained the contention of the respondent that there had been a reopening of that claim, saying (R. 77–78)—

> the filing of the second claim for refund on November 28, 1927, and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. * * *; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1938 [1928], and the suit of the taxpayer was filed within two years, or on September 19, 1929.

Considered as an original claim for refund, the claim for 1917 filed on November 28, 1927, of course would have no legal effect, for it was filed more than four years after 1920, the date on which the last of the taxes for 1917 had been paid. *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. It also could not be treated as an amendment to an earlier filed claim for 1917, for such claim had theretofore been definitively disposed of either by its allowance in the schedule of refunds and credits signed by the Commissioner on October 11, 1926 (O. R. 51), or its putative disallowance by the act of the Commissioner in the same instrument of crediting part of the allowed overpayment against the deficiency for 1918. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 72; *New York Trust Co., Executor* v.

United States, 87 F. (2d) 889 (C. C. A. 2d), certiorari denied, 301 U. S. 704.

As we have pointed out above, neither the claim for refund for 1917 filed on November 28, 1927, nor any other claim for 1917 is in the record. It was therefore speculation on the part of the court below to hold that the filing of the November 28, 1927, claim and its consideration on its merits was a reopening of an earlier filed claim. While we know that the earlier claim or claims were based upon a request for special assessment, which was granted, we do not know from the present record what was the ground of the November 1927 claim. Without knowing the ground of the November 1927 claim it was improper, we submit, for the court below to conclude that it was a request by the taxpayer for a reopening and reconsideration of an earlier rejected claim. For all we know, the November 1927 claim might have attempted to assert an entirely different ground from that relied upon in the original claim. If it did, that claim would itself be treated as an original claim, and, as we have shown above, so considered would be bad.

Since allegation and proof of the timely filing of a claim and a showing that suit was brought within two years of the rejection of the timely claim are jurisdictional, we submit that the respondent's suit must be dismissed for its failure to establish those essential facts.

B. The Petition Does Not Allege That the Tax for 1917 Was Erroneously or Illegally Collected

Furthermore, even under the lenient view which the court below has taken of the respondent's allegations and proof of jurisdictional facts, we submit that the District Court was without jurisdiction of this case. The court below has assumed that there was an original claim for refund for 1917 which was timely filed. It has treated the crediting in 1926 of part of the overpayment found by the Commissioner against the deficiency for 1918 as being, for purposes of suit, a *pro tanto* disallowance of the claim for 1917. And it has treated the consideration of the November 1927 claim for 1917 as being a reopening of the "disallowed" original claim. It has concluded that the suit was brought to recover that part of the claim for 1917 overpayment which had been disallowed by virtue of the credit, and that its institution in 1929 was timely because within two years of the rejection of the November 1927 claim.

The holding of the court below, therefore, necessarily is that the suit is grounded on the original claim for refund for 1917. But a fatal objection to such a holding lies in the fact, overlooked or ignored by the court below, that the original claims for 1917 were for special assessment under Section 210 of the Revenue Act of 1917 (O. R. 32), and the overpayment found by the Commissioner, part of which was credited against 1918 taxes and which

part the respondent is here seeking to recover, resulted from the granting of the request for special assessment.[4] See Brief in Opposition, p. 21. In these circumstances, it is impossible to say that there was an original erroneous or illegal collection by the collector—a condition precedent to maintenance of a suit in the District Court.

Section 24 of the Judicial Code, *infra*, p. 29, gives to the District Courts concurrent jurisdiction with the Court of Claims of all claims against the United States not exceeding ten thousand dollars, founded upon the Constitution of the United States or any law of Congress, and—

> of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

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[4] The same conclusion would be reached if the November 28, 1927, claim for 1917 be treated as an amendment of an earlier claim, for the amendment, to be good, must have been upon the same grounds. *United States* v. *Andrews*, *supra*; *United States* v. *Garbutt Oil Co.*, *supra*.

The common-law right of action to recover money exacted by a collector of internal revenue as taxes did not arise unless there was an erroneous or illegal collection by the collector—an exaction unauthorized by law. There must have been an unwarranted transaction, and the party to be charged therefor, the collector, must have been a party to the transaction. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1; *Arnson* v. *Murphy,* 109 U. S. 238. No statute has enlarged the collector's common law liability to suit. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302, 306, *supra.* The terms of the amendment to Section 24 of the Judicial Code quoted above conferring jurisdiction upon District Courts of suits against the United States to recover taxes in excess of $10,000 are: "tax alleged to have been erroneously or illegally assessed or collected" or "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws," if the collector by whom the tax was collected is dead or is not in office at the commencement of suit. The obvious purpose of the amendment, as this Court held in *Lowe Bros. Co.* v. *United States, supra,* was to permit a substitution of a suit against the United States for the suit previously allowed against the collector whenever the amount claimed exceeds $10,000 and the collector is out of office, and accordingly collection by the collector is the *sine qua non* of jurisdiction. Since the very gist of the right against the collector personally is

his participation in an exaction unauthorized by law, it must necessarily follow that no action can be maintained against him, or against the United States in the substituted suit under Section 24 of the Judicial Code, unless the action be founded upon an alleged wrongful collection.

The petition filed in the present case (O. R. 1–3) does not at any place allege a wrongful or erroneous collection of taxes for 1917. Its allegations are that the respondent received from the Commissioner of Internal Revenue a final communication showing an overassessment for 1917 of $91,570.34 and the crediting of $34,555.68 against a tax for 1918 which the respondent alleged had never been assessed. The action, the respondent states (O. R. 1), is:

> one to recover back Federal war profits taxes, excess profits taxes and income taxes plus interest for the taxable periods ended December 31, 1917, or December 31, 1918, as the case may be, both years being sued jointly; which the taxpayer alleges were erroneously and illegally withheld from the said petitioner [obviously relating to 1917] or erroneously and illegally collected from the said petitioner [obviously relating to 1918] * * *.

And then again in paragraph eighth of the petition the respondent stated (O. R. 3):

> Wherefore the petitioner claims a refund of $34,555.68 for 1918, representing an amount within less than four years which has been taken out of the 1917 proposed refund and employed to pay the 1918

> deficiency without having been assessed, hence claiming same as refund now for 1918 illegally paid, *or requesting the said same amount for 1917 as never having been fully paid after allowance.* * * * (Italics supplied.)

From these allegations of the petition it seems clear that the respondent was not attempting to state a cause of action founded upon an alleged erroneous or unlawful *collection* of the tax for the year 1917, but, on the contrary, was endeavoring to state a cause on an alleged wrongful withholding of part of an allowed claim. See pp. 25–25, *infra.*

Nor was the failure of the respondent to allege a wrongful collection inadvertent. It was due to a realization of its inability to prove such an allegation if one had been made. Computed according to the normal statutory method the taxes collected by the collector for 1917 were, so far as the allegations of the petition and facts appearing in the record show, due from the respondent. It was only pursuant to the granting of the request of the respondent for the special discretionary administrative relief under Section 210 of the Revenue Act of 1917 that an overpayment of taxes for that year was determined.[5] If the original claim for refund re-

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[5] This is clear from the Statement (O. R. 32), and it is admitted by respondent. It states (Brief in Opposition, pp. 19–20):

> Even if the question of special assessment had any bearing on the case it is clear that here special assessment was allowed and the Commissioner of Internal Revenue refused to pay over or refund the amount of overpayment thus determined * * *.

questing special assessment had been denied, instead of granted, it is perfectly well settled that no action could have been maintained against either the collector or the United States. *Welch* v. *Obispo Oil Co.,* 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502; *Williamsport Co.* v. *United States,* 277 U. S. 551.

The granting of the request for special assessment contained in the claim did not, we submit, increase the rights against the collector. The administrative relief was not granted because of an original wrongful collection, and the collector had no part in either the allowance of the administrative relief, or in the subsequent action, of which the respondent complains, of crediting part of the overpayment determined by the special method against taxes assessed for 1918. Cf. *Maas & Waldstein Co.* v. *United States,* 283 U. S. 583, 588; *Hammond-Knowlton, Administratrix* v. *Hartford Connecticut Trust Co., Executor,* 89 F. (2d) 175 (C. C. A. 2d), certiorari denied, 302 U. S. 707. Indeed, the theory of the court below upon the rehearing was not that the allowance of the original claim for refund gave the respondent any rights against the collector, or against the United States in the District Court, which would not have existed if the claim had been denied. Its latest holding was that, after the filing of the November 28, 1927, claim for 1917, there was a reopening and reconsideration of the original claim and then a final disallowance of that original claim. Under this view, therefore,

it is as if suit had been brought upon denial of a request for special assessment, and, as we have shown, the denial of such a request does not present a justiciable question.

C. The Petition Attempts to State a Cause of Action on an Allowed Claim for 1917, Which Is Not Within the Jurisdiction of the District Court

The court below, in its opinion handed down after the rehearing, treated the present suit, insofar as it relates to the year 1917, as one to recover that part of a claim for refund of a 1917 overpayment which had been disallowed (R. 78). In its earlier opinion, handed down on March 18, 1938, the court had reached a different conclusion and stated at the beginning of its opinion (R. 65) that the action was to recover part of an overpayment which had been allowed. That this was respondent's theory seems clear from the parts of its petition which we have heretofore quoted. We submit, however, that if this theory be adopted, nevertheless the District Court did not have jurisdiction.

The allowance of a claim, without more, does not import that there was an unlawful collection of a tax by a collector, for, as here, the allowance may be the result of special administrative relief granted by the Commissioner. The collector does not participate in allowing a claim, nor is he a party to the refusal to refund in cash. He can neither allow a refund nor draw money from the Treasury to pay it. Some participation by a collector in an unauthorized act is essential to hold

him liable personally, and some participation by him is likewise a jurisdictional prerequisite to suit in the District Court against the United States where recovery is sought of an amount in excess of $10,000 under Section 24 of the Judicial Code. *Moses et al., Executors* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *Hammond-Knowlton, Administratrix* v. *Hartford Connecticut Trust Co., Executor, supra; Otis Elevator Co.* v. *United States,* 18 F. Supp. 87 (S. D. N. Y.); *Gans Steamship Line* v. *United States,* 65 F. (2d) 1016 (C. C. A. 2d), certiorari denied, 290 U. S. 657; *First Nat. Bank* v. *United States,* 2 F. Supp. 107, 109 (E. D. Mo.); *Arthur C. Harvey Co.* v. *Malley,* 60 F. (2d) 97, 100 (C. C. A. 1st), affirmed on other grounds, 288 U. S. 415. Cf. *United States* v. *Savings Bank,* 104 U. S. 728, 734.

D. The Credit of the Allowed Overpayment for 1917 Against Taxes Assessed for 1918 Precludes Suit for the Year 1917

The petition (O. R. 1–3), as we have already seen, alleges that the Commissioner credited part of the overpayment determined for the year 1917 against taxes for the year 1918, and it is this part of the overpayment which is sought to be recovered. Actually, however, the only issue raised by the petition dealt with the year 1918—whether five waivers executed by the respondent were effective to extend the time for asessing the 1918 tax to July 3, 1926, the day it was actually assessed (O. R. 25). That question was ultimately decided against the Government.

Under such circumstances, we submit that the District Court has no jurisdiction of a suit for the year of original overpayment, and that the proper forum is the Court of Claims, in a suit on the year to which the overpayment was applied. This position is elaborated in the brief for the United States in No. 437, *United States* v. *Jaffray*, which is to be argued with the present case. Since that case involves credits against both barred and unbarred but erroneous deficiencies and contains a full discussion of the entire problem, we respectfully refer the Court to our brief in that case. If the position there taken as to credits against barred deficiencies is sound, the present case must be dismissed for lack of jurisdiction irrespective of the factors discussed in Parts A, B, and C, *supra*.

III

THE UNITED STATES HAS NOT WAIVED THE JURISDICTIONAL DEFECTS OF THE PETITION, NOR IS IT ESTOPPED TO RAISE THEM

The rule is well settled that the jurisdiction of a court may be questioned at any time in the course of the suit, or may be raised at any time by the court *sua sponte*. *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419–421; *Mansfield, C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 381–386. Since the United States may be sued only upon its own terms, any jurisdictional fact prescribed by the statute is essential, and cannot be waived. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *United*

States v. *Felt & Tarrant Co.*, 283 U. S. 269, 272; *Dalle* v. *United States*, 289 U. S. 367, 372; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71; *United States* v. *Michel*, 282 U. S. 656, 659; *Rock Island R. R. Co.* v. *United States*, 254 U. S. 141, 143; *Finn* v. *United States*, 123 U. S. 227; *Arnson* v. *Murphy*, 115 U. S. 579, 584; *Cheatham* v. *United States*, 92 U. S. 85, 88–89; *Nichols* v. *United States*, 7 Wall. 122, 130; *John F. Jelke Co.* v. *Smietanka*, 86 F. (2d) 470 (C. C. A. 7th), certiorari denied, 300 U. S. 669; *United States* v. *Chicago Golf Club*, 84 F. (2d) 914 (C. C. A. 7th).*

Consequently, the failure to deny the allegations of the petition is completely irrelevant. Of course, no denial was necessary of the legal conclusion (O. R. 1) that the action was brought in the District Court of the District of Massachusetts, "said

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* In *Tucker* v. *Alexander*, 275 U. S. 228, a stipulation was allowed to take the place of a full statement in the claim for refund of the grounds upon which refund was sought. See also *Howbert* v. *Penrose*, 38 F. (2d) 577 (C. C. A. 10th). That case has no application to jurisdictional defects which enlarge the liability of the United States beyond its consent, such as, in the present case, the failure to file timely refund claims (*United States* v. *Felt & Tarrant Co.*, 283 U. S. 269) or the failure to allege an illegal or erroneous collection (*Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373). The Act which directs the Attorney General and the District Attorney to represent the United States (Act of March 3, 1887, c. 359, 24 Stat. 506, cited in Brief in Opposition, p. 5), does not allow either of those officers, or anyone else, to enlarge the liability of the United States beyond that to which it has consented. *Finn* v. *United States*, 123 U. S. 227; *Tucker* v. *Alexander*, 275 U. S. 228, 231–232.

court having jurisdiction of the matters complained of * * *." Nor was a denial necessary of the conclusion in paragraph Fifth of the petition (O. R. 1) that "All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, * * *." The details are set out in the following paragraph (O. R. 2), and show affiramatively the jurisdictional defects. *Cf. KVOS, Inc.*, v. *Associated Press*, 299 U. S. 269, 277. Moreover, it is plainly beyond the power of the United States Attorney by any act on his part, to obviate the necessity for meeting the conditions upon which the United States has consented to be sued. *Munro* v. *United States*, 303 U. S. 36, 41; *Minnesota* v. *United States*, No. 73, decided January 3, 1939.

CONCLUSION

The judgment of the court below should be reversed, with directions to dismiss the case for lack of jurisdiction.

Respectfully submitted.

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JANUARY 1939.

APPENDIX

Judicial Code, as amended:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:

SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the

net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to

determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation

the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with

interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1917, * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) * * *

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, * * *. No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

(U. S. C., Title 26, Sec. 1672.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made

after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607. (U. S. C., Title 26, Sec. 1675.)

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

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